United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-[redacted]637

ORIGINAL

To be argued by Marvin V. Ausubel.

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P/S

United States Court of Appeals

For the Second Circuit.

FRANCIS J. LANGFORD, individually and as natural guardian of FRANK P. LANGFORD, an infant,

Plaintiff-Appellee,

against

CHRYSLER MOTORS CORP.,

Defendant-Appellant,

and

WOODBRIDGE DODGE, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF DEFENDANT-APPELLANT.

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TREATISE:

United States Court of Appeals

FOR THE SECOND CIRCUIT.

Docket No. 74-1367

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF DEFENDANT-APPELLANT.

Issues Presented.

1. Did the plaintiff sustain his burden of proof that the defendant, Chrysler Motors Corp., was the manufacturer, designer and engineer of the subject automobile?

2. Did the plaintiff sustain his burden of proof that the subject motor vehicle was manufactured, assembled and designed with a defective steering mechanism as alleged?

3. Did the plaintiff lay a proper foundation for the testimony of his expert, who examined the subject motor vehicle two months after the subject accident, without any proof as to what was done with the vehicle during that hiatus? Were the Court's findings of product defect consistent with the expert testimony in the case?

4. Did the trial court err in (a) refusing to permit defense counsel to attack the credibility of plaintiff's expert witness, Morfopoulos, by other testimony he had given and by documentary evidence, and (b) quashing the defendant's subpoena *duces tecum* which called for the production of the expert's work notes, bills, reports and records concerning the subject examination, as well as his records indicating his litigation experience and claims of expertise in almost all areas of human knowledge and activity?

5. Did the trial court err in finding the plaintiff free from any negligence in the manner he operated the subject vehicle in the light of all of the evidence in the case and, specifically, was he clearly in error in failing to consider or evaluate the testimony of the disinterested witness, the police officer?

6. If the defendant, Chrysler Motors Corp., is liable to the plaintiff, did the trial court err in granting the co-defendant full indemnity from it on the cross claim?

7. Did the trial court err in awarding damages in the sum of $9,000 based upon a finding of a permanent dental injury and a permanent scar?

Statement.

The Pleadings.

Plaintiff brings a diversity action against defendants for personal injuries allegedly sustained by his infant son as the result of a one-car automobile accident which occurred on December 3, 1971, on Victory Boulevard, Staten Island, New York. The complaint alleged that defendant, Chrysler Motors Corp., "or one of its divisions" (4a) manufactured a certain Dodge automobile which plaintiff purchased in July, 1971, from co-defendant, Woodbridge Dodge, Inc. Said vehicle was alleged to have been "improperly designed or assembled resulting in a seizure or disengagement of the ball stud from the socket resulting in the loss of steering control."

Plaintiff did not demand a trial by jury. The defendant, Chrysler Motors Corp., alleged to be the manufacturer, did not, nor did the co-defendant. Defendant, Chrysler Motors Corp., cross-claimed against co-defendant (9a) and counterclaimed against the plaintiff for his negligence in causing the accident. The answer of the defendant, Chrysler Motors Corp., specifically denied that it was the manufacturer or assembler of the vehicle. Co-defendant, Woodbridge Dodge, Inc., cross-claimed against co-defendant, Chrysler Motors Corp. (12a-15a), in addition to asserting a general denial. Plaintiff never replied to the counterclaim of defendant, Chrysler Motors Corp.

Facts.

Pre-delivery inspections, testing of the subject motor vehicle and its condition upon delivery to plaintiff, Francis J. Langford.

The deposition of the defendant, Woodbridge Dodge, Inc., by David Charles Ebert, its service manager, was read into the record (158a).

The subject motor vehicle was a 1971 two-door Dodge Dart Swinger. The probative testimonial evidence and documentary evidence disclosed that this vehicle came equipped with power steering and was sold to the plaintiff, Francis J. Langford, by the defendant, Woodbridge Dodge, Inc., on July 8, 1971 (Exh. A, 159a). It also came equipped with seat belts (46a).

This dealer had a regular practice, before a new vehicle was sold to a customer, to completely inspect and test the vehicle (160a). This inspection was in conformity with the New Jersey State inspection requirements and included the testing of the steering mechanism and the brakes (161a). It also included a road test of the vehicle (161a). The test involved, amongst others, an inspection and testing of the undercarriage and placing the vehicle on a lift (161a). It also involved checking the suspension of the vehicle and placing the car across a front end machine (161a).

The dealer was required to and did comply with the various inspection, road test and safety checks in Exhibit G which included an examination of the power steering, fluid level, the power steering hose and fittings, the steering coupling pin or lock bolt nut, the front wheel bearing, the ball joint stud nuts, the steering gear to frame bolts, the steering linkage (torque and

alignment), the Pitman arm nut (torque), the idler arm nut (torque), toe in, the steering center and to road test the vehicle for steering-control, returnability and power assist (Exh. G; 162a). One such form as Exhibit G had been completed in this case (162a) and, upon this pre-delivery inspection and test, the subject vehicle passed the New Jersey State requirements (162a). There was nothing mechanically wrong with the vehicle at the time of the original delivery of the subject vehicle to Mr. Langford (162a).

Pre-accident use of the vehicle from July 9, 1971 to December 2, 1971.

The plaintiff, Francis J. Langford, testified that he had 13 years of driving experience (18a). When he purchased this automobile from the defendant, Woodbridge Dodge, Inc., he claimed that the vehicle came equipped with regular and not power steering (27a). Indeed, it was his assertion that he did not want power steering and he operated the car for almost five months on the assumption that he had regular and not power steering although he had received an invoice which indicated that the car came equipped with power steering (27a-29a, 32a, Exh. A).

Between July 9, 1971 and December 2, 1971, this vehicle was driven 4,412 miles (Exh. 1). During the course of this use, Mrs. Langford had driven the car three-quarters of the time (29a, 30a). Mrs. Langford, although the principal user of the car, was not called as a witness.

Mr. Langford indicated that he had driven the car for about 1,000 miles during the five-month period (30a). He drove the car at different speeds and as high as 70 miles per hour (30a). He drove up and down the

Pocono Mountains with the car (30a). He drove on uneven terrain (30a). During all of this experience at no time did he ever have any difficulties steering the car at any speed he drove nor did he hear any noise or knock from the car or any screech of brakes or any screech of tires (30a). There was absolutely nothing unusual in the car's performance during this five-month history before this accident (30a).

Inspection of December 2, 1971, the day before the accident.

The manual that came with the subject motor vehicle recommended that the vehicle be brought in for servicing three months after sale or when the car had been driven 3,000 miles, whichever event first occurred (29a). However, on Thursday, December 2, 1971, the plaintiff drove the subject vehicle to the defendant, Woodbridge Dodge, Inc., for its initial service check-up by it at a time when the vehicle had 4,412 miles on it (31a).

When the car was brought to the defendant, Woodbridge Dodge, Inc., the day before this accident, it was tested and inspected between 4:46 p.m. and 7:08 p.m., a period of almost 2-1/2 hours (Exh. 1, 165a). The plaintiff listed all of his complaints concerning the vehicle, none of which involved the steering, brakes or transmission on the vehicle (32a, 165a). On the occasion of this examination, the defendant, Woodbridge Dodge, Inc., placed the car on a lift (164a). During the course of this examination they made an inspection of the steering mechanism and checked the vehicle for looseness and tightness in it (165a, 166a). They checked the wheel lugs on the wheels (166a). They placed the car on a front end machine to see if anything was loose (165a). They checked the wheel bearings, the tie rods and the steering box itself (166a). They checked the entire steering

mechanism and steering system of the car which could be done without disassembling any part of the car (166a). Mr. Ebert acknowledged that this inspection entailed an examination of the ball joint (166a, 167a).

Apart from Mr. Ebert's undisputed testimony as to the nature of the examination of the steering system on the vehicle the day before the subject accident, there was the uncontradicted corroborative testimony of Morris Hassan, a senior product development engineer for Chrysler Corporation (81a). This witness testified as follows:

> "Q. In other words, if I were to take my car to a mechanic would he be able to see or do anything to that ball joint? A. To inspect and see its condition?
> "Q. Yes. A. Yes, he could.
> "Q. Without disassembling it? A. Yes.
> "Q. He could pull the ball out of the joint? A. No.
> "Q. What would he have to do? A. To take a hold of the tie rod and push into it this way. If any wear has occurred it would be very loose.
> "Q. And does Chrysler recommend to its dealers that it perform this test at a three thousand or four thousand mile check or five thousand mile check. A. There's an inspection procedure to check all these parts, yes.
> "Q. At what point? A. Any time the car is being serviced for any reason, steering linkage is being inspected for any reason.
> "Q. Irrespective of looking at the steering linkage is that a standard part of the check up? A. You will even see gas stations attendants doing this because they are also trying to sell new parts" (85a, 86a).

The defendant, Woodbridge Dodge, Inc., found absolutely nothing wrong with the motor vehicle in connec-

tion with the steering, the brakes or the transmission (168a) on December 2, 1971.

Events of accident date—Friday, December 3, 1971, relating to legal liability.

This accident occurred on Friday, December 3, 1971, which was a work day for the plaintiff (33a). Mr. Langford arose at 6:00 a.m. and worked a full day (34a). That night he drove his son to some activity which involved driving some seven miles on the Staten Island Expressway at a speed of 60 miles per hour (35a). While driving on this expressway he had occasion to manipulate his steering wheel and found nothing unusual with the operation of it (35a). He did not hear the slightest noise or screech of any kind (35a).

Following his son's activity he started back for home at 9:30 p.m. and went back again on the Staten Island Expressway (35a). He again traveled about 60 miles an hour and did not experience anything unusual in terms of the steering or brakes on the vehicle (35a).

He got off the expressway at Victory Boulevard and then was proceeding along a substantially straight stretch of roadway along Victory Boulevard in a westerly direction (36a).

The weather was clear (36a), traffic was light (36a) and the roadway was well illuminated (116a). While he testified that he estimated his speed immediately before the accident at 30 miles per hour, he acknowledged that he had not looked at his speedometer to arrive at this conclusion (36a). As he was driving along Victory Boulevard, he did not sense any shimmy or shake of the car at any time prior to the accident (37a).

As he was driving westbound on this straight thoroughfare, Victory Boulevard, he claims he heard a loud noise and that instinctively he went for the brakes and applied his foot to the brake, all before he came into contact with any parked vehicle. Thus, he testified as follows:

> "Q. Now, then, after you had heard the loud noise did you apply the brake? A. Yes, sir.
> "Q. Did you have your feet on the brake from that point until the time that you smacked into the retaining wall? A. Yes, sir" (37a).
>
> • • •
>
> "Q. Now, all during that time did you apply your foot on the brake? A. Yes, sir.
> "Q. And when you applied your foot on the brake did your brake respond? A. Yes, sir.
> "Q. Did you apply it all the way down to the floor of the car? A. Yes, sir" (38a).
>
> • • •
>
> "Q. Do you recall when for the first time you put your foot on that brake after you heard that snapping sound? A. As soon as I heard the snapping noise I started to reach for the brake.
> "Q. That was before your car struck the Chevelle or simultaneously? A. Yes.
> "Q. You say you struck that brake hard? A. Yes" (48a).
>
> • • •
>
> "Q. All this time you had your foot on the brake, is that correct? A. Yes.
> "Q. And you were pressing down hard on it? A. Yes" (49a).

He also claimed that after he heard this noise while proceeding in a straight westerly direction he turned the steering wheel to the left and there was freedom of movement of the steering wheel at that time.

"Q. And all during that time were you turning the steering wheel to the left? A. Yes, sir.

"Q. Was the steering wheel turning to the left as you turned it to the left? A. Yes" (39a).

* * *

"Q. But there was freedom from movement of the steering wheel, is that correct? A. Yes, sir" (40a).

He testified that the police responded to the scene immediately after the accident (26a). He claimed that he told the police officer that he heard a snapping noise in the right front of the car before he impacted the vehicle and that he had had steering difficulty with the vehicle before the collision (26a).

The investigating police officer, John D'Angelo, was called as a witness by the defendant, Chrysler Motors Corp. (105a). This totally disinterested witness, with conceded training and qualifications, including membership in the Accident Investigation Squad for four years (106a), flatly contradicted the plaintiff, Langford. Mr. Langford never told the police officer that he heard a snapping noise in the right front section of the car (109a, 110a) and never complained to him about anything mechanically defective about the car (112a). Specifically, he never told him that there was anything wrong with the car's steering (110a).

The officer made out official detailed reports in connection with his investigation of this accident contemporaneous with the event (Ex. L, 110a). In this report, he was required to note whether there was any claim of unsafe equipment on the car and there was no claim made of unsafe equipment in this case (112a). The police officer testified that if Mr. Langford had made a claim of unsafe equipment or of a snapping noise, or

of a steering defect, he would have noted same in his memorandum book and in his report. This was not done because no such claim was made (33b).

> "Q. If Mr. Langford had mentioned anything about a steering defect or a snap, hearing a snap in the right front of the car, would you have recorded that in your book? A. Yes, sir" (117a).

Moreover, while even the plaintiff's expert acknowledged that if the plaintiff had applied his brakes as he claimed there would be physical evidence of such evasive action in the form of tire and skid marks (146a), Officer D'Angelo testified that there was absolutely no tire or skid marks related to this accident (110a).

Mr. Langford acknowledged that he struck the left rear portion of a parked vehicle with his right front section and that this collision was a "violent one" (37a, 38a). After this violent collision between the right front of his car and the left rear of the parked car, he then continued in a westerly direction and continued to strike the entire left side of the parked car (38a). All of these subsequent impacts along the entire left side of the parked car were violent impacts (38a). There was extensive damage to the entire left side of the parked car (38a). After he passed the parked car, he traveled an additional 15 to 25 feet on the roadway before he mounted the public sidewalk (40a-42a). The sidewalk which he mounted was four inches above the level of the roadway (42a). He then proceeded across the public sidewalk and the right front of his car was in a "violent collision" with a retaining wall (43a). This wall had a brick post on the edge of it and was otherwise 11 inches wide and composed of cinder block (43a). The right front of his car smashed into the brick post and knocked it over completely and pushed it about a foot

into the lawn (43a). In addition, as a result of this collision, about two bricks were knocked out of the wall (43a). The right front section of his car then mounted the retaining wall which was two feet four inches above the level of the sidewalk (43a, 47a, Exhs. I, J, K).

Although the plaintiff had claimed that he had his foot down hard on the brake from the time he heard the alleged snapping noise until the time that he mounted the retaining wall, and notwithstanding the numerous violent collisions with the parked car, his car only decelerated from his alleged speed of 30 miles per hour to 20 miles per hour when he collided with the wall (49a).

About three feet of his right front undercarriage was lodged on top of the retaining wall (43a, 44a).

> "Q. And is it fair to say that the entire right front undercarriage was smashed at that point? A. Yes, sir" (43a).

His hood was sprung (43a). His ignition key was stuck and damaged, his front end was smashed, including the motor, and his car was a total wreck from these impacts (43a, 44a, 50a, 107a, 108a). He heard loud noises when he struck the parked car as well as the wall (44a). He acknowledged that it was the collision with the retaining wall that caused the car to stop.

> "Q. Now, is it a fact that it was the collision with the retaining wall that caused the car to stop? Isn't that a fact? A. Yes, sir" (44a).

His right front tire was flattened by reason of the impacts (109a, Exhs. B, C).

After the accident he had occasion to look at the top of the retaining wall as well as his automobile.

> "Q. And at that time when you looked at it didn't you see damage to the undercarriage and the motor including the tie rod being bent underneath there? A. Yes.
>
> "The Court: Do you know what a tie rod is?
> "The Witness: Yes, sir" (45a).

The photographic evidence confirms the existence of a severely traumatized tie rod hanging out from the car all as a result of the impact or impacts (Exhs. B, C).

In addition to striking the retaining wall he also collided with a utility pole which was on the sidewalk and which was likewise a violent collision (45a). Finally, he also struck a second vehicle, a Volkswagen (46a).

The ruins—Saturday, December 4, 1971.

The following day a tow wrecker from Stapleton, Staten Island, removed the car from the scene by picking up this totally wrecked vehicle at the right front (46a). The wrecker used chains and a big bar in connection with his work (46a). The plaintiff never saw the vehicle again and does not know what happened to it from that point on (46a).

The Expert Testimony.

(a) Plaintiff's professional witness.

The plaintiff called Vasilis Morfopoulos (119a). This witness initially testified that whenever his name appears on the bottom of a report for his firm that he has personally examined the subject matter of that re-

port (136a). Initially he testified that he sends out about 200 reports a year (136a) and thereafter acknowledged that in the year 1972 his name appeared on 18,000 reports (137a).

Insofar as the subject case is concerned, he was first requested to make an examination of the subject vehicle on February 1, 1972 (123a). He did not know the precise date when he allegedly first inspected this vehicle (123a). He destroyed all of his work notes in connection with such examination (122a, 135a). His initial report was dated February 17, 1972 (123a). Thus, his examination took place approximately two months after the accident (123a). He did not know how the vehicle got from the scene of the accident to an auto salvage pool yard in Newark, New Jersey, where he examined the vehicle (123a). The subject vehicle had been driven some 200 miles from the time of the accident to the time that he examined it (149a).

Insofar as qualifications were concerned, he conceded that he never worked for an automobile manufacturer (144a, 145a).

In connection with his examinations, he was aware of the fact that there were tests to determine the force which would be required to get a tie rod into the bent condition that he eventually found it, but he never undertook such tests in this case (146a). He never checked with Chrysler Corp. as to whether the findings of the hardness of the materials on the subject vehicle met with the manufacturer's specifications (148a).

When he initially examined the vehicle, he found evidence that there was a mechanical deformation to the threaded arm of the ball joint which was secondary damage sustained by that component during the post-acci-

dent handling of the vehicle (125a, 126a). After he freed the tie rod assembly, he saw obvious signs of impact damage (127a). This included bowing deformation of the tie rod and components which were indications of impact damage (49b). The socket also showed an obvious area of pry-out separation of the ball joint stud from the socket (127a). He could determine this on the basis of visual examination without the need of microscopic confirmation (127a). He also found evidence of a cracking of the bearing in two areas as a result of impact (129a).

He found that the car had extensive damage to the right section including the wheel and that it was obviously the subject of a violent impact or impacts (145a). He found the right front tire was flat (146a). He saw impact evidence of a broken tie rod near the flat tire, (146a) and accordingly, that an automobile collision would be a competent and producing cause of all of such damage which he observed.

Insofar as the finding of a bent tie rod, this, too, was manifestly the subject of a violent trauma (146a). Such a trauma resulting in such impact force would cause a prying out as well as deformity of the tie rod and would result in cracks within the tie rod assembly as was found in this case (150a). He also found evidence of grease in the severed ball joint and wiped it off (150a).

The sole expert opinion proffered concerning any alleged pre-impact defect was a "pre-existing tightness and eventual seizure of the ball joint inside the socket" (130a). *At no time did this professional expert witness testify that this alleged condition was in the vehicle at the time of assembly and/or manufacture.*

The basis for his expert opinion was the finding of "gaulling marks" that he claims he observed. He conceded that this expression was never incorporated in any of his reports and that he used it for the *first* time when he testified at trial on September 11, 1973 (150a). He claimed that he saw evidence of seizure at the lip (192a). When his attention was directed on cross examination to the fact that the typical seizure appears at the throat rather than the lip, he corrected himself to say that the observation he made was actually at the throat and not at the lip (152a).

(b) Other expert witnesses.

In contrast with this testimony, the plaintiff called as witnesses Morris Hassan and Kenneth Kuschell, both employees of Chrysler Corp., not a party to this action. They had examined the alleged offending parts under laboratory conditions in Detroit, Michigan (58a), and tests were performed on tie rods on the proving grounds (98a).

Mr. Hassan is not only a serior product development engineer for Chrysler Corp. (81a) but works in the steering and suspension department of that company and has examined thousands of steering mechanisms as the one involved in this case (89a). He is familiar with all of the tests that are performed, and the procedures and the functions of the parts which were involved in this case (89a). He has had over 30 years of experience directly in the automotive industry and plaintiff's counsel conceded his qualifications (89a).

On examination of the parts (Exh. 2) he found the tie rod tube to have a little bend in it and that the shank of the tie rod forging was obviously bent and, most sig-

nificantly, the throat opening of the tie rod end had a *triangular deformation* which was a "text book example of pry out" (90a). This exhibit looked exactly like a tie rod that had been run through one of their own tests, a standard and recognized test which he described at length and which was originated by the Ford Motor Company (90a). Indeed, he had personally performed tests at the laboratory to produce the kind of cam out which existed in this particular case and found that it took 4,000 to 5,000 pounds of pressure to give that contour (90a). He ran four such tests on four assemblies to scientifically evaluate the forces and causes of the contour of this exhibit (91a). In connection with these tests he drew a graph which was received as Exhibit H. In this particular case "this tie rod assembly was subjected to a severe overload condition" and the accident is "about the only thing that would do it" (91a, 92a). There was absolutely no evidence of any pre-impact damage or pre-impact seizure (92a). "I cannot even imagine a seizure in a joint like this" (92a, 97a).

Kenneth Kuschell is a materials engineer (51a) who has a degree in metallurgical engineering, has been employed as a metallurgical engineer in the automobile field since 1964, and a teacher of metallurgy at a Michigan college (61a).

When he examined Exhibit 2 in the laboratory, he found that the tie rod tube had a definite bend to it, the tie rod end had a severe bend and there was a distortion of the throat opening of the tie rod body end. The stud had a visual bend to it and the bearing was jammed on to the ball end of the tie stud (59a, 60a). He also found that the bearing, itself, had extensive crushing of the bottom and there was evidence of pry out (61a).

He found evidence that these parts had been previously lubricated and there was extensive amounts of lubrication and grease around the part (61a).

There were file hardness tests performed on the bearing (63a, 64a) and the particular parts were tested for durability and strength by cutting a section on the tie rod end in the laboratory (70a). He has participated in hundreds of these tests (71a).

Based upon his extensive examination and laboratory tests, he was of the definite opinion that a severe overload (66a), namely a traumatic impact, was the cause of the damage portrayed to the parts making up Exhibit 2 (75a). There was absolutely no evidence of pre-impact defect or seizure (71a, 62a, 63a, 53a). Exhibit 2, as manufactured, conformed with all of the specifications for strength, durability and design (58a, 59a).

In lieu of formal testimony from Messrs. Hassan and Kuschell, it was stipulated that they would testify that it is impossible to have a seizure as described by plaintiff's expert and that if such a seizure occurred, as claimed by plaintiff's expert, the vehicle could not have pursued the course from the time of the alleged seizure to the point of impact or impacts as claimed by the plaintiff (157a).

Personal Injuries and Damages

The infant was confined to St. Vincent's Hospital for about ten days (25a) and thereafter saw a doctor three times within the first month after the accident, and a dentist (25a, 47a). He had a laceration of the lower lip and some bruises of the right side of the face (Exh. 11). He had a chipped, single lower central "baby" tooth which was capped (168a). He was then seven years old

and attended P. S. 26 (47a, 26a). He returned to school three weeks after the accident and has been attending school regularly since then (25a). His facial condition returned to normal about six months after the accident (47a).

Although Judge Costantino invited plaintiff's counsel to call the infant as a witness (25a), he did not testify. Nor was either the doctor or dentist called as witnesses. The hospital bill was $1,420.70 (Exh. 11).

POINT I.

The District Court was clearly erroneous in holding defendant, Chrysler Motors Corp., to be the manufacturer, designer, and engineer of the subject automobile.

Plaintiff's allegation in paragraph 5 of the complaint (4a) that defendant, Chrysler Motors Corp., manufactured the subject motor vehicle was denied (7a). There was absolutely no proof offered by the plaintiff to sustain his burden on this issue and the trial court did not refer to a single page in the record to support its finding on this fundamental issue.

In imposing liability on the defendant, Chrysler Motors Corp., the District Court specifically found that "Chrysler Motors Corporation * * * manufactured, designed and engineered the automobile (170a) * * *." A finding is "clearly erroneous" pursuant to Rule 52 of the Federal Rules of Civil Procedure when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U. S. 364 (1948). Where

the burden of proof requires clear, unequivocal and convincing testimony, this Court would be fully justified in setting the District Court's finding aside if the party having such a burden fails to present evidence on the issue. *Soccodato v. Dulles*, 226 F. 2d 243 (D. C. Cir. 1955). Additionally there is no question on this issue of the District Court having had to weigh the credibility of witnesses or witness demeanor. *Hedger v. Reynolds*, 216 F. 2d 202 (2d Cir. 1954). Where there is insufficient evidence to justify findings of fact they may be set aside as clearly erroneous. *Apache Powder Co. v. Ashton Co.*, 264 F. 2d 417 (9th Cir. 1959).

The District Court grievously erred in finding that the defendant, Chrysler Motors Corporation, was the manufacturer of the subject car. *Bohannon v. Chrysler Motors Corporation*, 366 F. Supp. 802 (S. D. Miss. 1973). This is especially so where the sole liability imposed upon Chrysler Motors Corporation was based upon the Court's acceptance of the plaintiff's theory that "Chrysler manufactured the automobile in question with a defective tie rod assembly" (173a) and where the co-defendant Woodbridge, a vendor, was allowed full indemnity over against Chrysler Motors Corporation as the alleged manufacturer of the car (174a). While there was no proof offered as to the relationship, if any, between Chrysler Motors Corporation and the manufacturer of the subject vehicle, even if there were, a parent corporation will not be held liable for the acts of its subsidiary corporation even if the former completely owns the stock of the latter. *Bujoso v. Metropolitan Transportation Authority*, A. D. 2d , 355 N. Y. S. 2d 800 (2d Dep't 1974); *Berkey v. Third Ave. Ry. Co.*, 244 N. Y. 84; *Bohannon v. Chrysler Motors Corporation, supra.*

The plaintiff wholly failed to sustain his burden of proof on the issue of who manufactured the vehicle, not

a scintilla of evidence having been offered. The pleadings and proof on this issue stand as they did on the date the complaint and answers were filed and the plaintiff is barred from recovering against the defendant, Chrysler Motors Corporation, in the present posture of the matter. *Bohannon v. Chrysler Motors Corp., supra.* Indeed, this defendant has been severely prejudiced by the plaintiff's failure to name as a proper defendant the manufacturer of the car inasmuch as, based upon the pleadings and the issues raised therein, a jury trial was never demanded solely because the defendant, Chrysler Motors Corporation was confident that the plaintiff could not prove the allegations of the threshhold issue in the case.

POINT II.

The plaintiff wholly failed to sustain his burden of proof on the issue that the subject motor vehicle was manufactured with a defective steering mechanism as alleged.

The burden of proof imposed upon the plaintiff before liability may be imposed for alleged defective manufacture is clear.

In *Rosenzweig v. Arista Truck Renting Corp.*, 34 A. D. 2d 542, 543, 309 N. Y. S. 2d 93, 95 (2d Dep't 1970), the Court wrote:

> "In products liability cases we have held that 'in order for a plaintiff to succeed under either of his causes of action' (negligence and breach of warranty) it is necessary for him to demonstrate that the instrumentality causing injury was 'in a defective condition on the date it was delivered' (*Cascia v. Maze Woodenware Co.*, 29 A. D. 2d

964, 289 N. Y. S. 2d 477, mot. for lv. app. den. and dec. amd. 30 A. D. 2d 806, 2 N. Y. S. 2d 755, affd. 23 N. Y. 2d 1000; 299 N. Y. S. 2d 445; *Natale v. Pepsi Cola Co.*, 7 A. D. 2d 282, 182 N. Y. S. 2d 404). Plaintiff has not sustained the burden of proof on this issue."

Accord: *Hayes v. Pennsylvania Lawn Products, Inc.*, 358 F. Supp. 644 (E. D. Pa. 1973).

> "However, in a 402A case the plaintiff must prove more than an unreasonably dangerous defect existing at the time of the injury; he must also prove that the product was in a defective condition *at the time it left the hands of the seller;* the seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful at the time it is used.[7]'" (Italics in original; footnote 7 reads):
>
> "7. Restatement (Second) of Torts, §402A, comment g at 351 (1965), approved in *Bialek v. Pittsburgh Brewing Co.*, 430 Pa. 1976, 242 A. 2d 231, 236 (1968)."

There is absolutely no evidence in this record to establish that this vehicle was manufactured with a defective steering assembly as alleged. The plaintiff himself, who operated the vehicle for approximately 1,000 miles during its five month history before the accident, disclaimed any steering deficit in the vehicle. The co-defendant, Woodbridge Dodge, Inc., inspected and tested the steering on this vehicle before delivery to the plaintiff the night before this accident. It found no steering defect of any kind. The two experts of Chrysler Corp. who tested and examined this vehicle under laboratory conditions indicated no pre-impact steering defect in this vehicle.

The completely disinterested testimony of the investigating police officer flatly contradicts the plaintiff's offer

of a contention of a steering defect at the accident scene. The only testimony, short of the sharply controverted testimony of the plaintiff of allegedly hearing a noise before impact, veering to the right before the collision with the parked car and reporting this to the police officer, was that of plaintiff's professional expert witness, Morfopoulos. Even he acknowledged substantial damage to the tie rod assembly as a consequence of this accident. This witness would go no further than to say that there was a seizure before impact and specifically refrained from testifying that the antecedent condition was in the car for almost 4,500 miles before the subject accident.

In sum, there is no proof upon which the Court could find that this car was manufactured with a steering defect as alleged for there is absolutely no evidence in this record of such a condition.

Moreover, the plaintiff failed to call as a witness at trial his wife who was the most substantial user of this vehicle prior to the accident. Nor was there any explanation for her failure to testify. Thus, the strongest inferences may be drawn against the plaintiff for his failure to call his wife as a witness. *Noce v. Kaufman*, 2 N. Y. 2d 347, 353, 161 N. Y. S. 2d 1, 5, 141 N. E. 2d 529, 531 (1957); *Laffin v. Ryan*, 4 A. D. 2d 21, 162 N. Y. S. 2d 730 (3rd Dep't 1957).

The trial court's reliance upon *Codling v. Paglia*, 32 N. Y. 2d 330, 345 N. Y. S. 2d 461 (1973), is misplaced. In that case there was specific, and multiple expert testimony that the defect in the vehicle existed at the time of manufacture and delivery to the user, and that that defect persisted to the time of the accident in question. In the case at bar the witness Morfopoulos, no stranger to products

liability litigation, specifically refrained from such a contention and confined his opinion to a "pre-existing tightness and eventual seizure" (1300). There is no authority under New York law that every claimed steering defect existing in a vehicle with more than 4,000 miles of use raises the inference or presumption that the alleged defect was in the vehicle at the time of manufacture, and a critical reading of *Codling* and its progeny does not sustain this new legal and economic burden Judge Costantino would place upon manufacturers and vendors.

POINT III.

The proof of plaintiff's expert, Morfopoulos, was completely deficient in that plaintiff failed to account for the subject car for the two months between the date of the accident and this witness' inspection; additionally, the court's findings are completely at variance with all of the expert testimony.

The plaintiff's proof completely fails to demonstrate in any way that the plaintiff's motor vehicle was in the same condition on the date of the alleged inspection and removal of parts sometime between February 1, 1972 and February 17, 1972 (123a), and the date of the accident, December 3, 1971. The plaintiff in this instance was required to lay a proper foundation as to the vehicle's condition during this two-month hiatus before the expert could testify as to what he allegedly found on February 17, 1972. *Barrett v. State*, 22 A. D. 2d 347, 256 N. Y. S. 2d 261 (4th Dep't 1965). Thus, in *Graham v. Board of Education of the City of New York*, 19 A. D. 2d 635, 241 N. Y. S. 2d 71 (2d Dep't 1963), the Court unanimously reversed a verdict for the plaintiff upon the ground that the plaintiff failed to establish that at the time of his

expert's examination of an allegedly defective ladder that the ladder was in the same condition as it was at the time of the accident.

In this connection, we urge that it is of some moment that, apart from the violent impacts with other vehicles and a retaining wall, the subject vehicle was picked up by a wrecker, on the day of the accident, at its right front (the area of the alleged offending parts). Chains and a big bar were used in connection with this work. More than two months later it was in a salvage pool yard (more appropriately a "junk yard") in Newark, New Jersey, when inspected. Not a witness was called to explain what was done with the vehicle during its 200 miles of travel between the accident and inspection. Nor was there any evidence offered of the absence of tampering, alteration or change of condition with respect of the vehicle or offending parts (123a).

Even accepting the witness Morfopoulos' supposed findings, the Court's decision is clearly erroneous in its analysis of his testimony. Thus, the Court's decision states that the witness Morfopoulos testified that the sole pre-impact damage found was a "pre-existing tightness which was manifested by abrasions on the bearing and gaulling damage and smeared metal on the inside of the socket" (172a) which resulted in "a seizure of a ball joint located in the tie rod assembly" (172a) and that "[u]pon visual examination of the tie rod, one can see abrasions on the bearing and gaulling damage and smeared metal on the inside of the socket" which clearly supports his testimony (173a, 174a). Morfopoulos actually testified that under *microscopic* examination he "found a substantial amount of metal smeared in and around the areas, and underneath the areas, where the ball joint was *eventually* forcibly removed in a forward

direction" (128a). (Italics supplied.) This presence of metal smeared deposits inside the ball socket was the only thing the expert found supposedly predating the accident (128a). Further, only under microscopic examination did this witness supposedly observe abrasions and gaulling damage in the smeared metal area inside the socket (129a).

The Court's decision further states that Chrysler Motors Corp. failed to refute or even explain the visible defects. The Court is again clearly in error. The expert Kuschell testified that there was no evidence of seizure whatsoever (62a, 65a); no evidence of bluing or gaulling (62a, 63a, 65a); that the surface was perfectly clean and polished fully (62a, 63a). The expert Hassan testified that the tie rod's condition after the accident was a text book example of pry out and looked exactly like a tie rod that had been run through the manufacturer's own tests (90a); that he found absolutely no pre-impact damage (92a); that there was no evidence of any pre-impact seizure or malfunction (92a, 97a); that seizure in a joint such as this is scientifically impossible (93a).

Thus, what the Court purportedly saw on visual inspection was seen only by the plaintiff's expert witness on microscopic examination, and additionally any contention made by the plaintiff's expert as to pre-impact damage was fully refuted by the Chrysler experts.

POINT IV.

The court's refusal to permit collateral attack on the witness Morfopoulos and its quashing of the subpoena issued by defendant, Chrysler Motors Corp., was clearly erroneous in view of its ultimate complete reliance on his testimony in finding liability against defendant, Chrysler Motors Corp.

Since the plaintiff's case rested solely on the question of causation it rested solely on the testimony and credibility of his expert. *Walker v. Firestone Tire & Rubber Company*, 412 F. 2d 60 (2d Cir. 1969). In this circumstance the defendant, Chrysler Motors Corporation, clearly had the right to inquire as to the witness' background, experience, and prior sworn testimony in other matters, in the hope of undermining the witness' credibility, and where such questions are not permitted the error is material and significant. *Walker v. Firestone Tire & Rubber Company, supra.* The defendant, Chrysler Motors Corp., specifically refused to concede Morfopoulos' qualifications (138a). The Court's hostility and refusal to permit collateral attack under these circumstances (138a, 139a, 140a, 141a, 142a, 143a, 144a) was reversible error. *Walker v. Firestone Tire & Rubber Company, supra.*

Additionally, the Court's quashing of the subpoena meant to elicit documentary evidence going to the heart of this witness' credibility was clearly erroneous. The Court's power to quash the subpoena is limited and the party seeking same must demonstrate that it is unreasonable and oppressive. F.R.C.P. Rule 45(b). Additionally, a motion to quash must be made in advance of the time stated in the subpoena for compliance. 5A *Moore's Federal Practice* 1725.

In the instant case, the party upon whom the subpoena was served apparently had no objection to producing the documents called for therein, the only objection being raised by plaintiff's counsel (134a).

The documents subpoenaed (Exh. N Id.) were produced by the witness in Court (134a). These documents were manifestly calculated to establish that the witness is a litigation expert who holds himself out as an expert on virtually everything and thus in reality, a witness who is not worthy of belief. Surely, these were documents which went to the heart of the credibility of this witness and were vitally relevant to a crucial issue in the case.

Moreover, the witness had destroyed his work notes (135a) and didn't even know the precise date he examined the vehicle (123a). Notwithstanding such a peculiar destruction of documentary evidence and uncertainty of proof, Judge Costantino refused to allow defense counsel to examine any independent documentary evidence concerning the witness's retention and details of his examination for, the quashed subpoena called for the production of the witness's "work notes, bills and records in connection with your examinations conducted in the above case." This went even beyond the "collateral" matter of credibility; it went to the circumstances of and findings on examination. The quashing of the subpoena frustrated the search for the truth and was plainly prejudicial to the defendant.

POINT V.

Assuming there should be a finding of liability against defendant, Chrysler Motors Corp., it is entitled to indemnity from the plaintiff, Francis J. Langford, on its counterclaim.

New York substantive law which governs this case now clearly recognizes a defendant's right to counterclaim against a plaintiff for indemnity and/or contribution (*Dole v. Dow Chemical Co.*, 30 N. Y. 2d 143, 282 N. E. 2d 288, 331 N. Y. S. 2d 382 [1972]; *Moreno v. Galdorsi*, 39 A. D. 2d 450, 336 N. Y. S. 2d 646 [2d Dep't 1972]; *Katz v. Dykes*, 41 A. D. 2d 913, 343 N. Y. S. 2d 399 [1st Dep't 1973]).

The evidence in this case abounds with negligence on the part of the driver, Francis J. Langford. For one, the disinterested witness, the reporting police officer, flatly contradicts his assertions concerning hearing a noise and a defective steering mechanism on the vehicle as a cause of the accident. He never made such an assertion nor was there any report of such a claimed defect in the official police report. The trial court never even referred to nor evaluated this proof in its opinion. This was clearly erroneous.

Mr. Langford, who possessed remarkable ignorance of the nature of his car which he used for five months before the accident, claimed to have used evasive action such as applying his brakes firmly and turning his steering wheel to the left. The photographic and physical evidence refute that contention. Had he used such evasive action, there would have been physical evidence in the form of skid or tire marks which were totally absent in this case. The car would not have struck the parked vehicle with such violence (and completely across

its left side). Nor would it have continued to meander as it did, mounting a four-inch sidewalk, smashing into a retaining wall, knocking over a brick post, knocking out two bricks and mounting a two feet four inch retaining wall with its right front undercarriage.

The photographic evidence as well as the testimonial evidence demonstrates the gross driver negligence and violent impacts all consistent with a total lack of control, unrelated to pre-impact product defect. The type of damage which was found in Exhibit 2 was tested out under laboratory conditions in Detroit and was found to have been only consistent with a violent force comparable with the grossest lack of control by a driver.

Under these circumstances, the defendant, Chrysler Motors Corp., if, under some conceivable hypothesis, it is held liable to the plaintiff, is entitled to indemnity from the plaintiff under the uncontroverted counterclaim in this case.

POINT VI.

Assuming there should be a finding of liability against the defendant, Chrysler Motors Corp., it is entitled to indemnity from the co-defendant, Woodbridge Dodge, Inc., on its cross-claim.

Under the *Dole* doctrine, a defendant may assert a cross-claim for indemnity and/or contribution against a co-defendant (*Kelly v. Long Island Lighting Co.*, 31 N. Y. 2d 25, 286 N. E. 2d 241, 334 N. Y. S. 2d 851 [1972]; *Frey v. Bethlehem Steel Corp.*, 30 N. Y. 2d 764, 284 N. E. 2d 579, 333 N. Y. S. 2d 425 [1972]; *Wood v. City of New York*, 39 A. D. 2d 534, 330 N. Y. S. 2d 923 [1st Dep't 1972]; *Fass v. City of New York*, 40 A. D. 2d 772, 337

N. Y. S. 2d 545 [1st Dep't 1972]; *Stein v. Whitehead*, 40 A. D. 2d 89, 337 N. Y. S. 2d 821 [2d Dep't 1972]).

This is true whether the theory of the underlying case is one in negligence or breach of warranty (*Noble v. Desco Shoe Corp.*, 41 A. D. 2d 908, 343 N. Y. S. 2d 134 [1st Dep't 1973]; *Rubel v. Stackrow*, 72 Misc. 2d 734, 340 N. Y. S. 2d 691 [Sup. Ct. 1973]).

In the case at bar it was the duty of the co-defendant, Woodbridge Dodge, Inc., to make a thorough inspection of the steering mechanism before delivery to the customer as well as on the occasion of its extensive examination the night before the accident. A defect such as was claimed here, if it existed, should have been discovered by the co-defendant upon such inspection. If there should be a finding against the defendant, Chrysler Motors Corp., it is entitled to indemnity from the co-defendant who was in a superior position to find the alleged defect and remedy it than the defendant, Chrysler Motors Corp.

It should be noted that the Court's decision repeats the fundamental inconsistency of its entire holding by stating that co-defendant, Woodbridge's degree of fault was minimal in that it could not have discovered the defect (175a) which was previously stated by the Court to be visually observable (174a). If indeed, the defect was visually observable then co-defendant certainly should have found it on the occasion of its thorough pre-accident inspection as is detailed in the testimony of the witness Eberd (158a, *et seq.*).

POINT VII.

The court's award of damages is clearly uncalled for in view of the proffered proof.

The infant plaintiff sustained comparatively minor personal injuries from this accident. While he was hospitalized for about ten days, he was seen by a doctor on only three occasions following this accident and all of such visits were within one month of the accident. He had a single chipped "baby tooth" which was capped. His facial appearance returned to normal within six months and he returned to school three weeks after the accident and has been attending school regularly since then. The cause of action for loss of services which originally sought approximately $2,000 in damages, turned out to be one limited to the hospital bill of $1,420.70.

We believe it is of some significance that the plaintiff failed to call the infant plaintiff as a witness (although invited to do so by Judge Costantino). Nor did the plaintiff call either the doctor or dentist who examined the infant for his injuries. The strongest inferences must be drawn against the damage claims for the unexplained failure to call these most material witnesses (*Noce v. Kaufman, supra; Laffin v. Ryan, supra*).

The principal basis for the Court's award of as much as $9,000 damages for personal injuries was a finding of "permanent injuries" in the form of "a small scar located under his lower lip and a chipped tooth" (176a). These findings of permanency were clearly erroneous. No doctor nor dentist was called as a witness and there is nothing in the hospital record or the evidence to indicate that these injuries are permanent. Judge Costantino himself recognized that in view of the child's age, that there was

no proof that the chipped tooth was a permanent, rather than "baby" tooth (101a). Under these circumstances an award of $9,000 was excessive (*Fox v. Raftery*, A. D. 2d , N. Y. S. 2d [2d Dep't 1974], N.Y.L.J. 6/13/74, p. 16, col. 2).

CONCLUSION.

The judgment below should be reversed and the complaint and cross-claim against the defendant, Chrysler Motors Corp., dismissed.

Respectfully submitted,

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Marvin V. Ausubel,
Of Counsel.

Service of three (3) copies of

the within

is hereby admitted this 29 day

of July, 197 .

Marshall G. Kaplan

Appellee

Service of three (3) copies of

the within

is hereby admitted this

29th.

day of

July, 197 .

Attorney for Appellee